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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 NATHAN E.,

8 Plaintiff,

9 v.

10 NANCY A. BERRYHILL, Deputy
11 Commissioner of Social Security for
Operations,

12 Defendant.
13

CASE NO. C18-5048-MAT

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

14 Plaintiff proceeds through counsel in his appeal of a final decision of the Commissioner of
15 the Social Security Administration (Commissioner). The Commissioner denied plaintiff's
16 applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after
17 a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the
18 administrative record (AR), and all memoranda, this matter is AFFIRMED.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1985.¹ He completed high school and one year of college.
21 (AR 48-49.) He has performed some part-time jobs, but nothing rising to the level of "past relevant
22 work." (AR 31, 48-50, 69.)

23

¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 Plaintiff protectively filed a DIB application on May 29, 2014 and an SSI application on
2 October 13, 2015, alleging disability beginning April 25, 2014. (AR 165-67, 175-80.) His
3 applications were denied at the initial level and on reconsideration.

4 On July 13, 2016, ALJ S. Andrew Grace held a hearing, taking testimony from plaintiff
5 and a vocational expert (VE). (AR 42-77.) On October 21, 2016, the ALJ issued a decision finding
6 plaintiff not disabled. (AR 21-33.)

7 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on
8 November 22, 2017 (AR 1-6), making the ALJ's decision the final decision of the Commissioner.
9 Plaintiff appealed this final decision of the Commissioner to this Court.

10 **JURISDICTION**

11 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

12 **DISCUSSION**

13 The Commissioner follows a five-step sequential evaluation process for determining
14 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
15 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
16 engaged in substantial gainful activity since the alleged onset date. At step two, it must be
17 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's
18 degenerative disc disease, major depressive disorder, and generalized anxiety disorder severe.
19 Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ
20 found plaintiff's impairments did not meet or equal the criteria of a listed impairment.

21 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
22 residual functional capacity (RFC) and determine at step four whether the claimant has
23 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform

1 a range of light work, with the following limitations: lift and/or carry twenty pounds occasionally
2 and ten pounds frequently; stand and/or walk and sit six hours in an eight-hour workday, with the
3 ability to change position from sitting to standing or from standing to sitting approximately every
4 thirty minutes; never climb ladders, ropes, or scaffolds; occasionally climb ramps and stairs,
5 balance, stoop, kneel, and crouch; never crawl; must avoid concentrated exposure to hazards, such
6 as moving machinery and unprotected heights; and limited to simple, routine, repetitive tasks,
7 consistent with unskilled work. Plaintiff had no past relevant work to consider in relation to the
8 RFC.

9 If a claimant demonstrates an inability to perform past relevant work, or has no past
10 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant
11 retains the capacity to make an adjustment to work that exists in significant levels in the national
12 economy. With the assistance of the VE, the ALJ found plaintiff capable of performing other jobs,
13 such as work as a cashier II or small products assembler.

14 This Court's review of the ALJ's decision is limited to whether the decision is in
15 accordance with the law and the findings supported by substantial evidence in the record as a
16 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). *Accord Marsh v. Colvin*, 792 F.3d
17 1170, 1172 (9th Cir. 2015) ("We will set aside a denial of benefits only if the denial is unsupported
18 by substantial evidence in the administrative record or is based on legal error.") Substantial
19 evidence means more than a scintilla, but less than a preponderance; it means such relevant
20 evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v.*
21 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of
22 which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
23 F.3d 947, 954 (9th Cir. 2002).

1 Plaintiff avers error in assessing his symptom testimony and medical opinions, and
2 resulting errors in the RFC and at step five. He requests remand for an award of benefits or,
3 alternatively, further proceedings. The Commissioner argues the ALJ's decision has the support
4 of substantial evidence and should be affirmed.

5 Symptom Testimony

6 The rejection of a claimant's subjective symptom testimony² requires the provision of
7 specific, clear, and convincing reasons. *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).
8 "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and
9 what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th
10 Cir. 1996). The ALJ may consider a claimant's "reputation for truthfulness, inconsistencies either
11 in his testimony or between his testimony and his conduct, his daily activities, his work record,
12 and testimony from physicians and third parties concerning the nature, severity, and effect of the
13 symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

14 The ALJ here found plaintiff's statements concerning the intensity, persistence, and
15 limiting effects of his symptoms not consistent with the medical and other evidence of record. He
16 provided several specific, clear, and convincing reasons in support of that conclusion.

17 The ALJ considered plaintiff's testimony he had pain in all areas of his back, but had not
18 discussed surgery or conservative treatment with his doctors. (AR 27.) He did not take pain
19 medication due to his difficulty swallowing pills, but this did not account for the lack of other
20 treatments, such as pain relief steroid injections, use of a TENS unit, or surgical correction.
21 Despite the absence of significant treatment, plaintiff alleged he could only stand for thirty minutes
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23 ² While the Social Security Administration (SSA) eliminated the term "credibility" from its sub-regulatory policy addressing symptom evaluation, *see* Social Security Ruling 16-3p, case law containing that term remains relevant.

1 and sit for thirty minutes before needing to change positions. The record reflected almost no
2 treatment for back pain, other than chiropractic treatment and physical therapy, and plaintiff
3 “sought routine health maintenance treatment, rather than treatment for significant pain
4 management.” (AR 28.) Plaintiff has also “stated he feels quite well, and at times he has even
5 stated his back feels good.” (*Id.*) While identifying problems swallowing pills, plaintiff was using
6 medication to treat mental health symptoms and stopped only because of side effects, not due to
7 difficulty swallowing. Considering plaintiff’s “only routine, conservative, and sporadic treatment
8 for his back disorder,” the ALJ found the medical evidence did not support the significant physical
9 restriction alleged. (*Id.*) He found even less documentation associated with plaintiff’s mental
10 health, noting plaintiff had not sought counseling during the period at issue, “because he tries to
11 handle his mental health condition by himself.” (AR 29.)

12 Plaintiff points to his testimony he took medication for his mental health symptoms in
13 liquid form, utilizing an oral concentrate diluted in water. (AR 57.) He argues his choice of
14 treatment should not be held against him, noting he told his providers the chiropractic work and
15 physical therapy were helpful (AR 64, 461), and that no doctor recommended more extreme
16 treatment, such as surgery (AR 51). Plaintiff also notes the ALJ’s failure to identify and address
17 his testimony he needed to lie down twenty minutes a day. (AR 63-64.)

18 The ALJ erred in identifying a conflict between plaintiff’s explanation for not taking pain
19 medication for his back and his use of medication, in liquid form, for his mental health symptoms.
20 However, given the other valid reasons for discounting plaintiff’s symptom testimony, this error
21 was harmless. *Carmickle v. Commissioner, Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir.
22 2008). The ALJ, for example, reasonably considered that plaintiff’s difficulty swallowing pills
23 did not preclude the use of other treatment options, as well as evidence of his symptom reporting,

1 *see Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (ALJ may consider a claimant's
2 inconsistent or non-existent reporting of symptoms).

3 Nor did the ALJ otherwise err in considering treatment. An ALJ properly considers
4 evidence associated with treatment, 20 C.F.R. § 416.929(c)(3), Social Security Ruling (SSR) 16-
5 3p, including unexplained or inadequately explained lack of treatment, *Tommasetti v. Astrue*, 533
6 F.3d 1035, 1039 (9th Cir. 2008); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005), use of
7 conservative or minimal treatment, *Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007); *Meanel*
8 *v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999), and favorable response to conservative treatment,
9 *Tommasetti*, 533 F.3d at 1039-40.

10 Plaintiff cites to *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007), in challenging the ALJ's
11 consideration of his treatment. (Dkt. 14 at 10, 12.) In that case, the Ninth Circuit recognized the
12 failure to seek treatment may not serve as a proper basis for rejecting symptom testimony in cases
13 "where the stimulus to seek relief is less pronounced, and where medical treatment is very unlikely
14 to be successful," and found nothing suggesting adherence to an 1800 calorie-per-day diet would
15 have eliminated or ameliorated the claimant's obesity. *Orn*, 495 F.3d at 638. Considering the
16 claimant's testimony he could not afford more treatment, the Court noted disability benefits could
17 not be denied based on a failure to obtain treatment due to a lack of funds. *Id.* However, in this
18 case, plaintiff did not identify a lack of funds or other reason for his failure to pursue further
19 treatment. Nor is it apparent additional treatment would not have been helpful. The ALJ
20 reasonably contrasted plaintiff's testimony with his sporadic, routine, conservative, and in some
21 respects successful treatment.

22 In addition, the ALJ sufficiently described plaintiff's testimony and properly assessed the
23 testimony as a whole. Error is not shown by the failure to assess each and every statement made.

1 *See generally Treichler v. Comm’r of Social Sec. Admin.*, 775 F.3d 1090, 1102-03 (9th Cir. 2014)
2 (finding one-sentence, boilerplate finding insufficient; while the analysis “need not be extensive,
3 the ALJ must provide some reasoning” to allow for a meaningful determination the conclusions
4 are supported by substantial evidence.”); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991)
5 (findings “must be sufficiently specific to allow a reviewing court to conclude the adjudicator
6 rejected the testimony on permissible grounds and did not ‘arbitrarily discredit a claimant’s
7 testimony regarding pain’”) (quoted source omitted).

8 The ALJ also properly considered the symptom testimony in relation to the medical
9 evidence. While subjective testimony may not be rejected based solely on an absence of full
10 corroboration by objective medical evidence, medical evidence remains a relevant factor. *Rollins*
11 *v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). Symptoms diminish capacity for basic work
12 activities only to the extent the alleged functional limitations and restrictions “can reasonably be
13 accepted as consistent with the objective medical evidence and other evidence.” 20 C.F.R. §§
14 404.1529 (c)(4), 416.929(c)(4). An ALJ may reject testimony upon finding it contradicted by or
15 inconsistent with the medical record. *Carmickle*, 533 F.3d at 1161; *Tonapetyan v. Halter*, 242
16 F.3d 1144, 1148 (9th Cir. 2001).

17 The ALJ acknowledged the existence of objective evidence, but found plaintiff’s
18 statements as to the intensity, persistence, and limiting effects of his symptoms not entirely
19 consistent with or supported by the medical evidence. While plaintiff reported chronic back pain
20 and stiffness to Dr. Diana Velikova in records dated around the alleged onset date, he sought
21 treatment in relation to reported dizziness, nausea, weakness, and sweats related to anxiety. (AR
22 27, 309-14; *see* AR 311 (“Main concerns are nausea, anxiety, abdominal pain.”)) Imaging studies
23 in September 2014 revealed no improvement in the lumbar spine since studies taken in 2006, but

1 also showed no nerve root compression. (AR 27-28, 298-99, 396-97.) Plaintiff had difficulty with
2 hip and knee extension in a September 2014 examination by nurse practitioner Nancy Armstrong,
3 but also other normal range of motion (ROM) findings, and he had generally mild symptoms in an
4 October 2014 psychological examination. (*Id.* (citing AR 40, 393, 402-04).) In a June 2016
5 examination by Dr. Littu Skariah, plaintiff did not have muscle weakness and reported no
6 arthralgias, joint pain, back pain, or swelling. (AR 27, 451).)

7 Plaintiff contends the ALJ impermissibly “played doctor” and should have deferred to the
8 opinion of non-examining source Dr. Brent Packer. However, “the ALJ is responsible for
9 determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities.”
10 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). *Accord Treichler*, 775 F.3d at 1098;
11 *Carmickle*, 533 F.3d at 1164. When evidence reasonably supports either confirming or reversing
12 the ALJ’s decision, a court may not substitute its judgment for that of the ALJ. *Tackett v. Apfel*,
13 180 F.3d 1094, 1098 (9th Cir. 1999). Where there is more than one rational interpretation, the
14 ALJ’s interpretation of the evidence must be upheld. *Morgan v. Commissioner of the SSA*, 169
15 F.3d 595, 599 (9th Cir. 1999).

16 The ALJ identified evidence reasonably supporting his conclusion and rationally
17 interpreted the evidence as a whole. The ALJ also gave plaintiff the benefit of the doubt by
18 including in the RFC the need to only stand for thirty minutes at a time and sit for thirty minutes
19 before needing to change positions. (AR 28.) He observed that, even if he found plaintiff’s back
20 condition more serious and requiring a limitation to sedentary work, the VE identified jobs existing
21 in significant numbers plaintiff could perform. (AR 29.) The Court, as such, finds no error in the
22 ALJ’s consideration of the medical evidence and symptom testimony.

23 The ALJ, finally, found evidence of plaintiff’s activities, including his ability to stay

1 engaged in church activities, attend weekly meetings, and walk around for extended periods and
2 spend time with others for his ministry, inconsistent with his testimony as to the degree of his
3 limitation. (AR 27-28.) This provided an additional specific and legitimate reason for rejecting
4 plaintiff's testimony. *Orn*, 495 F.3d at 639 (activities may undermine credibility where they (1)
5 contradict the claimant's testimony or (2) "meet the threshold for transferable work skills"). For
6 this reason, and for the reasons stated above, the ALJ's assessment of plaintiff's subjective
7 symptom testimony is supported by substantial evidence.

8 Medical Opinions

9 Plaintiff avers error in the assessment of the medical opinions of non-examining
10 "acceptable medical source" Dr. Packer and examining "other source" ARNP Armstrong.³
11 Because the record contained contradictory physician opinions from non-examining State agency
12 physicians Drs. Leslie Arnold and Dennis Koukol, the ALJ could reject the opinion of Dr. Packer
13 with specific and legitimate reasons, supported by substantial evidence in the record. *Lester*, 81
14 F.3d at 830-31. The opinion of nurse practitioner Armstrong was entitled to less weight than the
15 opinion of a physician, *Gomez v. Chater*, 74 F.3d 967, 970 (9th Cir. 1996), and could be discounted
16 with germane reasons, *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). The Court, for the
17 reasons set forth below, finds sufficient reasons for rejecting the opinions of both Dr. Packer and
18 Armstrong.

19 In a form completed on behalf of Washington's Department of Social & Health Services
20 (DSHS) on September 23, 2014, Armstrong assessed plaintiff as severely limited, meaning unable
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22 ³ New regulations, applicable to claims filed after March 27, 2017, include advanced practice
23 registered nurses, audiologists, and physician assistants as acceptable medical sources, and recognize other
licensed health care workers as "medical sources" and other sources of evidence as "nonmedical sources."
20 C.F.R. §§ 404.1502, 416.902.

1 to meet the demands of sedentary work. (AR 391-92, 400.) An attached chart reflects limited
2 ROM in plaintiff's back and neck, "cannot do" in regard to hips and knees, and otherwise normal
3 ROM. (AR 40, 393.) A record of Armstrong's examination documents neck and low back pain
4 and a positive Romberg sign. (AR 400.)

5 Dr. Packer, on September 22, 2015, reviewed medical records on behalf of DSHS,
6 including the form and record from Armstrong, a September 24, 2014 MRI, and a September 13,
7 2015 examination record from nurse practitioner Patricia Lynch documenting tenderness,
8 limited/reduced ROM, and a positive straight leg raise test. (AR 419.) Dr. Packer found plaintiff
9 limited to less than sedentary work activity, and unable to sustain sedentary work for even brief
10 periods or to sit for most of the day without frequent position changes or substantial employer
11 accommodation. (AR 419.) He described the MRI as "compelling for L1-2 pathology including
12 wedge [fracture] and L sided foraminal disc protrusion that may well affect the nerve root if
13 progressed." (*Id.*) Considering the positive straight leg raise test (AR 460-61), it was "reasonable
14 to conclude progressive severity approaching or meeting the level of SSA listing 1.04A." (AR
15 419.) Dr. Packer stated: "This would agree with the 2014 opinion by ARNP Armstrong, with no
16 significant current change." (*Id.*) He recommended "benefit to [claimant] as 'unable to sustain'
17 pending further treatment as warranted." (*Id.*)

18 Drs. Arnold and Koukol, on October 8, 2014 and February 4, 2015 respectively, found
19 plaintiff could lift and/or carry fifty pounds occasionally and twenty-five pounds frequently, sit,
20 stand, and/or walk up to six hours, frequently perform postural activities and climb ramps and
21 stairs, but never climb ladders, ropes, or scaffolds, and needing to avoid hazards. (AR 83-85, 94-
22 96.) The ALJ assigned these opinions significant weight, finding general consistency with the
23 medical evidence showing no significant back pain, the general lack of consistent treatment, and

1 the imaging studies reflecting a mild to moderate lumbar disc disorder, but not a disorder that
2 would prevent full time work. (AR 29.) However, the ALJ limited plaintiff to light work, with
3 position changes, based on additional records received after they rendered their opinions.

4 The ALJ assigned the opinions of Armstrong and Dr. Packer limited weight. Armstrong
5 “submitted a check box form with no supporting explanation.” (*Id.*) It was not consistent with the
6 medical records or level of treatment sought by plaintiff throughout the period at issue. (AR 29-
7 30.) There was a single imaging study within that period and plaintiff had not sought pain
8 management treatment from a medical doctor for his back disorder. (AR 30.) While he obtained
9 chiropractic care and sought physical therapy, there was no indication he sought other therapies,
10 such as pain medication, steroid injections, or surgical correction. Armstrong’s examination did
11 not appear thorough, and her opinion seemed to be based in large part on plaintiff’s allegation he
12 was unable to perform many of the requested exercises, rather than on actual clinical findings.
13 Armstrong “is not an acceptable medical source who can diagnose an impairment” and, while Dr.
14 Packer is an acceptable medical source, he did not examine plaintiff and his opinion seemed to be
15 based solely on the report from Armstrong, which was not based on significant clinical findings.
16 The ALJ found the opinions of Drs. Arnold and Koukol more consistent with the evidence, which
17 showed a back impairment not more restrictive than accounted for in the RFC.

18 Plaintiff objects to the ALJ’s reliance on the opinions of Drs. Arnold and Koukol over the
19 opinions of Dr. Packer and Armstrong. Dr. Arnold cited only an MRI from 2006 and could not
20 have reviewed more recent treatment records. (AR 81.) Dr. Kuokol did not indicate any review
21 of the 2014 MRI or any evidence beyond that considered by Dr. Arnold. (*See* AR 88-96.) Neither
22 reviewed the records from Armstrong or Lynch.

23 Plaintiff contends the ALJ failed to sufficiently acknowledge the deterioration in his

1 condition shown by the 2014 MRI, including disc protrusion and annular tear “slightly more
2 prominent as compared to the prior study.” (AR 397.) This, together with the examination
3 findings of Armstrong and Lynch contributed to Dr. Packer’s assessment of progressive severity.
4 Plaintiff contends the State agency physicians were underinformed by comparison. He denies Dr.
5 Packer relied too substantially on the opinion of Armstrong and asserts that, even if Armstrong
6 had relied on his subjective reports, Dr. Packer cited to Armstrong’s interpretation of the MRI and
7 disagreed in part with Armstrong’s conclusions. Plaintiff also rejects any reliance by the ALJ on
8 the previously described treatment notes from Drs. Velikova and Skariah, noting both of these
9 physicians worked in concert with Lynch and Armstrong and neither raised concerns regarding the
10 veracity of plaintiff’s reporting.

11 Plaintiff likewise objects to the sufficiency of the reasons for rejecting the opinion of
12 Armstrong. Her status as a nurse practitioner did not serve as a reason to reject her opinion.
13 Plaintiff denies Armstrong relied on his subjective reporting, pointing to her consideration of the
14 2006 lumbar spine MRI and thoracic and chest x-rays (AR 40)⁴ and her ROM testing (*see* AR 39-
15 40, 391-92), the latter of which he maintains the ALJ ignored. He rejects the ALJ’s criticism of
16 the examination based on Armstrong’s observation he could not perform all ROM tests. (AR 393
17 (“cannot do”).) Plaintiff also rejects the characterization of the report as check-box, stating it was
18 a summary based on record review and testing, and asserting its consistency with nursing,
19 chiropractic, and physical therapy records. He again takes issue with the criticism of his choice of
20 treatment given that no physician suggested more extreme treatment would be successful and his
21 lifelong difficulty swallowing pills.

23 ⁴ Plaintiff initially argued Armstrong considered the 2014 MRI, but conceded in reply this was not
the case given that that MRI came after Armstrong’s report.

1 The ALJ provided several germane reasons for rejecting Armstrong's opinion, including
2 the absence of an explanation supporting the check box form, inconsistency with the medical
3 record and the minimal treatment sought, and apparent reliance on plaintiff's subjective reporting.
4 See 20 C.F.R. §§ 404.1527(c)(3)-(4), 416.927(c)(3)-(4) (the more relevant evidence and the better
5 an explanation provided in support of an opinion, and the more consistent an opinion is with the
6 record as a whole, the more weight that opinion will be given); *Molina*, 674 F.3d at 1111 (ALJ
7 may reject check-off reports not containing explanations for conclusions); and *Tommasetti*, 533
8 F.3d at 1041 (ALJ may reject an opinion based on inconsistency with the record or where based
9 to a large extent on self-reports properly discounted by the ALJ). See also *Batson v.*
10 *Commissioner*, 359 F.3d 1190, 1195 (9th Cir. 2004) (treating physician's opinions properly
11 discounted when it is "in the form of a checklist, did not have supportive objective evidence, was
12 contradicted by other statements and assessments of [the claimant's condition], and was based on
13 [the claimant's] subjective descriptions of pain[,] as well as when that opinion is "conclusory,
14 brief, and unsupported by the record as a whole . . . or by objective medical findings[.]" The
15 ALJ's failure to describe the results of each ROM exercise does not demonstrate he failed to
16 consider all of the results. Armstrong failed to provide an explanation for her conclusion, could
17 not have considered the later 2014 MRI and subsequent examination findings of Dr. Skariah and
18 Lynch, and her chart note can be rationally interpreted to reflect her reliance on plaintiff's report
19 he could not perform various ROM exercises. The Court further finds no reversible error in the
20 ALJ's recognition of Armstrong's status as an "other source."

21 As plaintiff observes, Dr. Packer did not rely solely on Armstrong's report. Dr. Packer
22 considered other evidence, including the 2014 MRI, positive Romberg sign from Armstrong, and
23 positive straight leg test from Lynch. (AR 419.) However, the ALJ can be said to have reasonably

1 concluded Dr. Packer seemed to base his opinion in significant part on the report from Armstrong.
2 (*See id.* (the conclusion plaintiff's condition was approaching or meeting listing level severity
3 "would agree with the opinion by ARNP Armstrong, with no significant current change.")). The
4 Court finds the overstatement as to the extent of the reliance on Armstrong's report harmless error.
5 *Molina*, 674 F.3d at 1115 (ALJ's error may be deemed harmless where it is "'inconsequential to
6 the ultimate nondisability determination.'"; the court looks to "the record as a whole to determine
7 whether the error alters the outcome of the case.") The ALJ's decision reflects his determination
8 that Dr. Packer's opinion, like the opinion of Armstrong, was inconsistent with the medical
9 evidence and the evidence of treatment, and that it placed too much significance on a report which
10 lacked the support of significant clinical findings. These serve as specific and legitimate reasons
11 for assigning little weight to the opinion of Dr. Packer. *See* 20 C.F.R. §§ 404.1527(c)(3)-(4),
12 416.927(c)(3)-(4); *Molina*, 674 F.3d at 1111; *Tommasetti*, 533 F.3d at 1041; and *Batson*, 359 F.3d
13 at 1195.⁵

14 Moreover, while assigning greater weight to the opinions of the other non-examining
15 physicians of record, the ALJ did not adopt those opinions in full. The ALJ, instead, found plaintiff
16 more limited than Drs. Arnold and Koukol opined given the evidence received after they rendered
17 their opinions. The record contains substantial evidence support for the ALJ's decision to find
18 plaintiff more capable than assessed by Armstrong and Dr. Packer, but more limited than found
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20 ⁵ The Commissioner counters plaintiff's assertion of consistency between the opinion of Dr. Packer
21 and the findings of Armstrong and Lynch with other findings in the record, such as Dr. Velikova's April
22 2014 finding of no neurological deficits and a negative Romberg's sign (AR 304) and the absence of
23 neurological deficits found and plaintiff's denial of back pain and other symptoms to Dr. Skariah in June
2016 (AR 451-56). However, this analysis is not included in the ALJ's decision. Nor did the ALJ clearly
link the assessment of Dr. Packer's opinion to an earlier rejection of an argument by counsel that, based on
the opinion of Dr. Packer and the positive straight leg test, plaintiff met the criteria of listing 1.04. (AR 28
("[T]his is not an accurate reading of the listing. Positive straight leg raise testing is insufficient without
accompanying motor loss, as required by the listing."))

1 by Drs. Arnold and Koukol.

2 Steps Four and Five

3 Plaintiff argues that, given the errors in the consideration of his symptom testimony and
4 the medical opinions, there is a lack of substantial evidence support for the RFC, VE hypotheticals,
5 and step five finding. This mere restating of plaintiff's arguments does not establish error at step
6 four or step five. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008).

7 CONCLUSION

8 For the reasons set forth above, this matter is AFFIRMED.

9 DATED this 6th day of November, 2018.

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12 Mary Alice Theiler
13 United States Magistrate Judge
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